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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

10,056

FILE: B-193142

DATE: May 8, 1979

MATTER OF: Alan Scott Industries

*[Protest of Government Failure to Offer Definitive Bid
Information]*

DIGEST:

1. Determination by Department of Defense not to amend Armed Services Procurement Regulation to incorporate definition of "manufacture" under Buy American Act is exercise of executive discretion not reviewable by GAO in bid protest.
2. Where offeror excludes no end products from its Buy American Certificate and does not otherwise indicate that it is offering anything other than domestic end products, acceptance of offer results in obligation on offeror to furnish domestic end products. Compliance with obligation is matter of contract administration which does not affect validity of award.
3. Protester has failed to affirmatively establish objection to delivery requirement where protester offers no evidence to support allegation and other prospective contractors submit proposals without objection to quantity requirements.

On September 20, 1978, the Defense Personnel Support Center (DPSC) of the Defense Logistics Agency (DLA) issued a request for proposals (RFP) for the procurement under a requirements-type contract of an estimated 20,000 "Forceps, Hemostatic, Rochester-Pean, Curved, 6-1/4 inch." This particular item had been selected for inclusion in the Department of Defense Commercial Commodity Acquisition Program which permits the purchase of items on the basis of their commercial acceptability rather than conformance to detailed specifications peculiar to the Government. Offerors were required to identify supplies of foreign origin for the purpose of application of Buy American Act differentials and were advised of potential competition from sources in the United Kingdom which would be evaluated without application of import duties or the price differentials normally applied under the Buy American Act.

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A preaward survey resulted in an unfavorable determination of the low offeror's responsibility. However, DLA has been advised informally by the Small Business Administration (SBA) that it intends to issue a certificate of competency (COC) to the low offeror. The SBA's issuance of a COC is conclusive as to the low offeror's responsibility and DLA is bound thereby. See 15 U.S.C. § 637(b)(7)(C) (1976); Keco Industries, Inc., B-193121, November 3, 1978, 78-2 CPD 326. Alan Scott Industries (Alan Scott) was not the low offeror.

Alan Scott initially protested to our Office on October 11, 1978, prior to the closing date set for receipt of proposals, that: "Solicitation is restrictive with Government failure to offer definitive bid particulars to allow for Alan Scott participation in accord to Armed Services Procurement Regulations. Offered solicitation will have limited response with probability that award will be evaluated for J. Sklar Instrument Co." and advised that details would be furnished after the protest was documented. Alan Scott's initial response to our request for the details of its protest provided the following clarification:

"Cause for Bid Protest:

- "1 - Government failure to offer definitive bid information related to Clause B06 and C76 [Buy-American Act clauses] to allow for Alan Scott participation in accord with the Small Business Act. Please note attached October 16, 1978, letter to the Commissioner of Customs for clarification.
- "2 - Government failure to determine source for total instruments supplied by our competition and offered as domestic supply.

"3 - Delivery requirements in Solicitation for quantities designated after award are not historically available from stock from known contractors."

In response to a second request for clarification, Alan Scott reiterated the above objections without elaboration and added an allegation that at a pre-proposal conference on October 4, the contracting officer failed to support Alan Scott's representative when he objected to alleged interruptions by another contractor of the representative's questions. In support of its objections, Alan Scott furnished copies of articles from various newspapers and trade publications pertaining to DPSC's procurement of medicinal drugs and reports of waste in Government, excerpts from Alan Scott's own prior correspondence concerning similar matters, and the cover letter from a 1974 questionnaire issued by this Office incident to an audit of Department of Defense surgical supply stocks.

We have interpreted Alan Scott's contention that the solicitation lacked definitive information with respect to the Buy American provisions to mean that the solicitation lacked sufficient detail to enable Alan Scott to determine whether the Buy American differentials would be applied to its offered product. The intent of Alan Scott's reference to the Small Business Act is unclear. Alan Scott's supporting documents indicate that its offered forceps are produced from blanks forged in England which are machined in the United States, then exported to Pakistan for manual filing and finishing, polishing, assembly, final passivation for corrosion resistance, and shipping. DLA states that the solicitation contained all of the clauses required with respect to the Buy American Act and, in any event, it would be impracticable to draft definitive criteria which anticipate a manufacturing scheme as geographically fragmented as that employed by Alan Scott.

The basic criteria by which manufactured products are evaluated for application of Buy American differentials are set forth in Executive Order 10582, December 17, 1954, published at 19 Fed. Reg. 8732, December 21, 1954. Under this order, a Buy American Act

differential must be applied if the end product to be furnished (1) is not manufactured in the United States or (2) is manufactured in the United States but consists of foreign components which make up 50 percent or more of the total component cost. See New Britain Hand Tools Division, Litton Industrial Products, Inc., B-191838, November 1, 1978, 78-2 CPD 312. Manufactured articles are considered domestic products under the Buy American Act if the end product has been manufactured in the United States "substantially all from articles, materials or supplies mined, produced or manufactured, as the case may be, in the United States." 45 Comp. Gen. 658 (1966). The act applies to the end product and the components directly incorporated into the end product; it does not apply to the supplies or materials used in the manufacture of such components. Ibid.

The question of what constitutes "manufacture" has been the subject of numerous decisions by our Office. See discussion in Cincinnati Electronics Corporation, et al., 55 Comp. Gen. 1479, 1492-1497 (1976), 76-2 CPD 286, and decisions cited therein. Neither the Buy American Act nor Executive Order 10582 requires the issuance of regulations defining "manufacture" and the Department of Defense has declined to amend the Armed Services Procurement Regulation to incorporate such a definition, although we have on prior occasions recommended such action. See Cincinnati Electronics Corporation, et al., supra; Davis Walker Corporation, B-184672, August 23, 1976, 76-2 CPD 182. The determination of the Department of Defense not to issue such a regulatory change constitutes a proper exercise of executive discretion over which, while we may disagree, we have no review authority in the bid protest context. 41 Comp. Gen. 339 (1961).

Alan Scott's contention that the agency has not determined the source of instruments furnished by its competitors provides no basis upon which we might question the propriety of this procurement. We have held that where a bidder or offeror excludes no end

products from its Buy American Certificate and does not otherwise indicate that it is offering anything other than domestic end products, acceptance of its bid or offer, if otherwise responsive, results in an obligation on its part to furnish domestic end products, and compliance with that obligation is a matter of contract administration which has no effect on the validity of the contract award. New Britain Hand Tools Division, Litton Industrial Products, Inc., supra; 50 Comp. Gen. 697 (1971).

To the extent that Alan Scott's protest represents an objection to the contracting officer's conclusion that Alan Scott's offer would be subject to application of Buy American Act differentials, we see no need to reach this question. Alan Scott would not have been the low offeror even if the differentials were not applied to its offer and, as a result, we perceive no prejudice to Alan Scott which might result from the application of the differentials to its bid.

Alan Scott has provided no evidence in support of its allegations regarding the delivery requirements. The DLA has advised us that a number of prospective contractors submitted proposals without objecting to the delivery requirements. We consider this an indication that these offerors, at least, expect to be able to meet the delivery requirements. In these circumstances, we think Alan Scott has failed to sustain its burden of affirmatively establishing its case. Ocean Electric Corporation, B-192700, December 1, 1978, 78-2 CPD 381; Dependable Janitorial Service and Supply, B-190231, January 3, 1978, 78-1 CPD 1.

Finally, even if it were true that during the preproposal conference the contracting officer failed to take action to prevent another prospective contractor from being impolite to Alan Scott's representative, it would not provide a basis for us to question this procurement.

The protest is denied.


Deputy Comptroller General
of the United States